Filed 5/22/12 In re J.S. CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re J.S., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. J.S., Defendant and Appellant.	A131645 (Contra Costa County Super. Ct. No. J0900388)

The trial court adjudged defendant a ward of the court pursuant to Welfare and Institutions Code section 602 after defendant admitted one count of committing a lewd and lascivious act with a child (Pen. Code, § 288, subd. (a).)[1] Subsequently, defendant violated his probation and, on March 28, 2011, the court continued defendant as a ward of the court and placed him in the Department of Juvenile Facilities (DJF) for a maximum term of eight years.

Defendant contends on appeal that a minor cannot violate section 288, subdivision (a), and that the evidence did not satisfy the rebuttable presumption under section 26 that he was too young to understand the wrongfulness of his actions. He also claims the court erred by failing to give him various advisements, that the notice of his probation violation was inadequate, and that the possibility he may have to register as a sex offender in the

[1] All further unspecified code sections refer to the Penal Code.

future violated his substantive due process rights and constituted cruel and unusual punishment. We reject these claims or conclude that they are premature.

Defendant also raises various challenges to the court's placement of him in DJF. The People agree that the court erred under the recent holding of *In re C.H.* (2011) 53 Cal.4th 94 when it committed him to DJF. Accordingly, we reverse his commitment to DJF.

BACKGROUND

On March 12, 2009, a petition under Welfare and Institutions Code section 602 was filed. It alleged that defendant committed two counts of lewd and lascivious acts with a child. (§ 288, subd. (a).)

At the hearing on May 5, 2009, defendant stated that he was 13 years old and the court noted that it had to "take" a section 26.[2] The court asked defendant whether his parents taught him the difference between right and wrong and the difference between telling the truth and a lie; defendant responded, "Yeah," to both questions. When asked what would happen if he did something wrong, defendant replied that his parents would take some things away. If he did something right, he would earn those things back. If behaving correctly, he agreed that he would receive praise and be told that he was a good boy.

The court continued: "And with respect to what's been charged here, do you understand that this type of act is wrong? Did you know it was wrong at the time that you did it?" Defendant responded, "Yes." The court stated: "I will find that the requirements of Penal Code section 26 are complied with; that [defendant] did know the difference between right and wrong, truth and lies; that he knew that at the time this act was committed, that he knew it was wrong to do it." Subsequently, defendant admitted one count of committing a lewd and lascivious act and the second count was dismissed.

The probation officer filed his report on May 19, 2009. He recommended that defendant be adjudged a ward of the court and that he be removed from his parents or

[2] Defendant was 12 years old at the time of the incident.

guardians. With regard to the crime, the probation officer observed that the police report stated that on October 25, 2008, Cecilia Reyes told an officer that she saw defendant and the eight-year-old victim underneath some bushes. She noticed that both defendant and the victim had their pants down and defendant was behind the victim making "humping movements." Reyes called another neighbor; both agreed that defendant and the victim appeared to be having anal intercourse. Reyes and the other neighbor contacted the police. Both Reyes and the other neighbor confronted defendant and the victim; defendant and the victim pulled their pants up and began to walk away. Reyes and the other neighbor told the police that they did not see any penile penetration.

The police officers located defendant on the other side of the apartment complex. He was sitting on a curb and crying loudly. Defendant began to yell, "I didn't do anything," and told the officers that he and the victim were inside some bushes throwing rocks.

The police officers contacted the victim at his residence and spoke with the victim and his mother. The victim stated that defendant's " 'man' (his word for penis) had touched his butt." He further stated that this had happened four times. He said that defendant called him to the bushes, which was a "hideout" and "secret place." When he walked up to defendant, defendant had his pants and underwear down; defendant pulled down the victim's pants and underwear. Defendant positioned his hips behind the victim and began thrusting his hips into the victim's buttocks. The victim added that defendant's "penis was 'kind of hard' and that [defendant's] penis entered his 'butthole,' but 'not all the way.' " He said that defendant had done the same thing on three other occasions.

Subsequently, defendant claimed that the victim had asked him to "hump" him. He declared that the victim was the one who pulled his own pants and underwear down. Defendant maintained that he lowered only his pants, but not his own boxer shorts. Defendant asserted that the victim kept trying to back into defendant's penis while defendant kept backing away.

The probation officer reported that defendant never expressed any remorse and did not accept responsibility for his actions when he interviewed him. Defendant remarked that he hated the victim and was upset that he got caught.

On June 2, 2009, at the disposition hearing, the juvenile court adjudged defendant a ward of the court and placed him in the custody of the probation department. A month later, on July 3, 2009, defendant was placed at Gateway Residential Programs (Gateway).

On August 16, 2009, defendant assaulted a staff person at Gateway. On August 17, 2009, Gateway expelled defendant from the program for refusing to comply with the program's rules. He had broken the blinds, pounded on the furniture, tagged items with gang signs, threatened teachers, and grabbed the penis of another male resident. A notice of probation violation was filed on August 20, 2009, and, on September 3, 2009, defendant admitted the violation.

On September 28, 2009, defendant was placed at Martin's Achievement Place (Martin's Place). A few weeks later, on October 11, 2009, defendant was expelled from Martin's Place for aggressive and violent behavior, including causing over $5,000 in damage to staff vehicles. Defendant was temporarily placed in juvenile hall. On December 7, 2009, defendant admitted the probation violation. Defendant was put on medication and returned to Martin's Place on January 22, 2010.

Defendant's placement at Martin's Place was terminated on July 24, 2010, due to an incident occurring about 9:00 p.m. on this date when defendant was in the living room at Martin's Place watching television with two other residents. Staff member Kuini Tuaau was watching the residents. When Tuaau walked from the living room to the office, defendant placed his hands on her hips from behind and started pushing his erect penis against her through his clothing. After she yelled, "Stop," she turned around and saw defendant holding her. Defendant ran out the front door of the house. Another staff member, Fernando V. Ortega IV, found defendant hiding by the backyard fence. Defendant initially said that he did not know what had happened but then explained that he followed Tuaau into the office; he then got an "impulse" to place his hands on her hips

and press against her. Defendant was arrested for felony sexual battery and placed in juvenile hall.

A notice of probation violation was filed on July 27, 2010. This notice was dismissed and a new notice was filed on November 5, 2010. After a contested probation revocation hearing on December 6, 2010, the court sustained the probation violation.

Defense counsel stated that defendant had been accepted by the Breaking the Cycle program. Counsel also suggested the alternative of the San Francisco Forensic Institute. The probation department recommended commitment to DJF.

Following a contested disposition hearing on March 28, 2011, the court continued defendant a ward of the court and placed him in DJF for a maximum term of eight years.

Defendant filed a timely notice of appeal.

DISCUSSION

I. *Defendant's Violation of Section 288, Subdivision (a)*

Defendant contends that a minor under the age of 14 years cannot, as a matter of law, violate section 288, subdivision (a). He also maintains that interpreting this statute to apply to persons under the age of 14 violates his equal protection rights.

A. *Applying Section 288, Subdivision (a) to a Minor*

Defendant argues that a minor cannot be a perpetrator under section 288, subdivision (a), because it would be absurd and inconsistent with the purpose of the statute to permit a minor to be both a perpetrator and victim. Defendant acknowledges that this argument has been rejected by a number of courts (see, e.g., *In re Jerry M.* (1997) 59 Cal.App.4th 289, 296-297 [held that section 288 applied to minor although evidence was insufficient to sustain the finding in the case before it]; *In re Paul C.* (1990) 221 Cal.App.3d 43, 50-51 [rejected argument that section 288 could not be applied to a minor]; *In re Billie Y.* (1990) 220 Cal.App.3d 127, 131 [held that minor knew wrongfulness of his conduct], disapproved on another ground in *In re Manuel L.* (1994) 7 Cal.4th 229, 239, fn. 5.)

Section 288, subdivision (a) provides: "Except as provided in subdivision (i), any person who willfully and lewdly commits any lewd or lascivious act, including any of the

acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years."

Defendant stresses that the purpose of section 288 is to protect children under the age of 14 from sexually predatory adults. (See *People v. Soto* (2011) 51 Cal.4th 229, 245-246 (*Soto*).) Thus, when explaining that consent is not a defense to aggravated lewd conduct, the Supreme Court in *Soto* explained that the Legislature "recognized that there is an inherent imbalance of power in" a sexual encounter between a child and an adult and a child cannot give legal " 'consent' " to sexual conduct until the age of 14. (*Ibid.*)

Defendant's reliance on *Soto, supra,* 51 Cal.4th 229 is misplaced. The Supreme Court in *Soto* did not suggest that section 288 could not apply to a minor perpetrator. Rather, it focused on the Legislature's intent to protect minor victims and therefore held that the perpetrator was precluded from asserting that the minor consented to touching under section 288 under any circumstances. (*Soto,* at p. 248.) The entire focus of the Supreme Court in *Soto* was on protecting the victim minors; the court did not consider the issue of minor perpetrators. The court never suggested that it disapproved of the holdings of earlier cases that applied section 288 to minor perpetrators. (See, e.g., *In re Jerry M., supra,* 59 Cal.App.4th 289.)

Defendant also quotes heavily from *Planned Parenthood Affiliates v. Van de Kamp* (1986) 181 Cal.App.3d 245 (*Planned Parenthood*) and argues that the logic underlying this case supports his argument that section 288 cannot be applied to him. The court in *Planned Parenthood* held that the Child Abuse Report Act, as then written, did not require professionals to report a minor as a child abuse victim solely because the minor was under the age of 14 when the child had indicated that he or she had engaged in voluntary, consensual sexual activity with another minor. (*Id.* at p. 255.) With regard to whether a minor could be found responsible for violating section 288, the court stated that "[i]t does not appear that a minor under 14 may be found delinquent for violating

section 288." (*Planned Parenthood,* at p. 274.) However, the court also cautioned: "We can conceive of a hypothetical, sexually sophisticated 13-year-old who abuses a much younger child with the requisite criminal intent to exploit his or her sexual naivete." (*Id.* at p. 276, fn. 14.)

Defendant argues that the logic underlying *Planned Parenthood* and *Soto* compels the conclusion that only an act committed "willfully" may be punishable and children under the age of 14 are legally incapable of exercising free will in sexual matters. Defendant proclaims that it is absurd to conclude that a child is too immature to consent to any sexual act and then be found to have violated section 288. Defendant asserts that applying the statute to minors would make every child who masturbates in violation of the law.[3] Defendant also surmises that interpreting the law to apply to minors would increase the likelihood of children from a "rough or gang-ridden neighborhood" to be convicted of this crime because they would have less opportunity to participate in sexual behavior in the privacy of their own homes.

We reject defendant's argument and agree with the reasoning previously set forth in *In re Paul C., supra,* 221 Cal.App.3d 43 and *In re Jerry M., supra,* 59 Cal.App.4th 289. As the court in *In re Jerry M.,* pointed out, *Planned Parenthood* contained dictum that a minor was probably legally incapable of violating section 288 but several courts have disagreed and held that minors can violate section 288, subdivision (a). (*In re Jerry M.,* at p. 295; see also *In re Paul C.,* at p. 49.) The court in *Paul C.* concluded that the language in section 288, subdivision (a) makes it clear that the statute applies to "any person who willfully and lewdly commits any lewd or lascivious act" and " 'any person' " included a person under the age of 14 years, upon proof of the minor's knowledge of the wrongfulness of his or her acts along with evidence of criminal intent. (*In re Paul C,* at pp. 50-51, citing *In re Gladys R.* (1970) 1 Cal.3d 855, 867 [interpreted "[e]very person" in former section 647a (currently, § 647.6, subd. (a)(1)) to apply to minors].)

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[3] Section 288 has been consistently interpreted as requiring a victim and a perpetrator and therefore the statute does not apply to masturbation.

The court in *In re Paul C., supra,* 221 Cal.App.3d 43 rejected the defendant's reliance on *Planned Parenthood,* explaining: "*Planned Parenthood* suggests an under-14 minor cannot know of the wrongfulness of conduct violating section 288 because such a minor is legally incapable of consenting to an act violating section 288. [Citation.] However, the prohibition on consent as a defense to a violation of section 288 is a categorical legal prohibition, in the nature of a salutary legal fiction, adopted for the protection of children under age 14. [Citation.] The prohibition does not mean that such children are in fact incapable of understanding sexual conduct. [Citation.] Nor does the prohibition mean that minors under age 14 are incapable of knowing the wrongdoing of their sexual conduct. 'A person under age 14 is not conclusively presumed incapable of committing a violation of Penal Code section 288. It is not all that unusual for mature children age 13 or younger sexually to molest children even younger than they knowing it is wrong to do so.' [Citation.] 'That an act is usually committed by adults against children, is made criminal for the protection of children, and requires a minor as victim, does not mean that the act cannot be performed by a minor.' [Citations.]" (*In re Paul C.,* at p. 51.)

We agree with the reasoning of *In re Jerry M., In re Paul C.,* and *In re Billie Y.* Furthermore, a violation of section 288 requires proof of the minor's knowledge of the wrongfulness of the person's acts as well as evidence of criminal intent. "The question of when, who, and under what circumstances a minor should be charged with a violation of section [288] must reside within the sound exercise of prosecutorial discretion." (See *In re T.A.J.* (1998) 62 Cal.App.4th 1350, 1365 [discussing a minor's violation of section 261.5, unlawful sexual intercourse].)

B. *Equal Protection*

Defendant contends that the equal protection analysis adopted in *People v. Hofsheier* (2006) 37 Cal.4th 1185 (*Hofsheier*) supports the conclusion that interpreting section 288 to apply to perpetrators under the age of 14 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Defendant argues that construing section 288 to cover a 12-year-old rubbing his penis against an

eight-year-old child's buttocks[4] violates his equal protection rights because he would not have been incarcerated had he engaged in oral sex under section 288a[5] or unlawful sexual intercourse under section 261.5.[6] These latter statutes require the perpetrator to be 21 years old or more or more than 10 years older than the victim.

"The constitutional guaranty of equal protection of the laws under the federal and state Constitutions ' "compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. " ' [Citation.] Where the statutory distinction at issue neither 'touch[es] upon fundamental interests' nor is based on gender, there is no equal protection violation 'if the challenged classification bears a rational relationship to a legitimate state purpose. [Citations.]'

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[4] The victim stated that defendant penetrated his rectum.

[5] Section 288a reads in relevant part: "(a) Oral copulation is the act of copulating the mouth of one person with the sexual organ or anus of another person. [¶] (b)(1) Except as provided in Section 288, any person who participates in an act of oral copulation with another person who is under 18 years of age shall be punished by imprisonment in the state prison, or in a county jail for a period of not more than one year. [¶] (2) Except as provided in Section 288, any person over the age of 21 years who participates in an act of oral copulation with another person who is under 16 years of age is guilty of a felony. [¶] (c)(1) Any person who participates in an act of oral copulation with another person who is under 14 years of age and more than 10 years younger than he or she shall be punished by imprisonment in the state prison for three, six, or eight years."

[6] Section 261.5 provides in pertinent part: "(a) Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a 'minor' is a person under the age of 18 years and an 'adult' is a person who is at least 18 years of age. [¶] (b) Any person who engages in an act of unlawful sexual intercourse with a minor who is not more than three years older or three years younger than the perpetrator, is guilty of a misdemeanor. [¶] (c) Any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year . . . . [¶] (d) Any person 21 years of age or older who engages in an act of unlawful sexual intercourse with a minor who is under 16 years of age is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment . . . ."

[Citation.] That is, where there are plausible reasons for the classification, our inquiry ends." (*People v. Alvarado* (2010) 187 Cal.App.4th 72, 76.)

" 'The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' " (*Hofsheier, supra*, 37 Cal.4th at p. 1199.) "It may well be that in most cases . . . persons who commit different crimes are not similarly situated, but there is not and cannot be an absolute rule to this effect, because the decision of the Legislature to distinguish between similar criminal acts is itself a decision subject to equal protection scrutiny. 'The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes. [Citation.] It also imposes a requirement of some rationality in the nature of the class singled out.' [Citations.] Otherwise, the state could arbitrarily discriminate between similarly situated persons simply by classifying their conduct under different criminal statutes." (*Ibid.*, fn. omitted.)

Defendant acknowledges that the Supreme Court applied the rational basis test in *Hofsheier*, but argues that the rational basis test is not appropriate in this situation because his fundamental liberty interests are implicated. He adds that we should consider "closer scrutiny" if we reject his argument that strict scrutiny should be applied.

"California courts have never accepted the general proposition that 'all criminal laws, because they may result in a defendant's incarceration, are perforce subject to strict judicial scrutiny.' " (*People v. Owens* (1997) 59 Cal.App.4th 798, 802.) A defendant "does not have a fundamental interest in a specific term of imprisonment or in the designation a particular crime receives." (*People v. Flores* (1986) 178 Cal.App.3d 74, 88.) Here, defendant does not claim that the classification involves a suspect class; he also does not claim that he faces a longer period of confinement as a juvenile than he would as an adult. "Application of the strict scrutiny standard in this context would be incompatible with the broad discretion the Legislature traditionally has been understood to exercise in defining crimes and specifying punishment." (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838.) Accordingly, we conclude that the rational basis test applies.

Defendant complains that if he had engaged in an act of oral copulation with the victim, section 288a would not have applied to him because he was neither 21 years of age nor 10 years older than the victim. Section 261.5 also could not apply to him because the victim was only two years younger than him and defendant was not 21 years old. He claims that his equal protection rights were violated because he suffered more serious consequences for violating section 288 even though this type of sex act, according to defendant, was no more culpable than the sex acts under sections 288a and 261.5. (See *Hofsheier, supra,* 37 Cal.4th at p. 1203.)

Defendant relies on *Hofsheier, supra,* 37 Cal.4th 1185, but *Hofsheier* is unavailing. In *Hofsheier,* the Supreme Court held that persons convicted of voluntary oral copulation with 16- or 17-year-old minors and those convicted of voluntary sexual intercourse with minors of the same age were similarly situated for purposes of mandatory sex offender registration under section 290 where the only difference between the two offenses was the nature of the sexual act. (*Hofsheier,* at pp. 1200, 1206-1207.) Here, defendant has not shown that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. Section 288 requires that the defendant have " 'the specific intent of arousing, appealing to, or gratifying the lust of the child or the accused.' [Citation.]" (*People v. Warner* (2006) 39 Cal.4th 548, 557, italics omitted.) In contrast, unlawful intercourse under section 261.5 and oral copulation under section 288a, are general intent crimes. Those who commit the specific intent crime of committing a lewd act with a child under the age of 14 are not "similarly situated" to those who commit a general intent offense. (See, e.g., *People v. Singh* (2011) 198 Cal.App.4th 364, 371.)

Since we conclude that defendant has not demonstrated that he was subject to unequal classification with any similarly situated groups, we do not address whether there was any rational basis to differentiate between minors violating section 261.5 or section 288a, and those violating section 288, subdivision (a).

II. *Defendant's Understanding of the Wrongfulness of His Action*

Defendant contends that the record contains insufficient evidence to rebut the presumption under section 26 that he was too young to understand the wrongfulness of his actions.

Section 26 provides in pertinent part: "All persons are capable of committing crimes except those belonging to the following classes: [¶] One—Children under the age of 14, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness." Thus, to declare a child a ward of the juvenile court under Welfare and Institutions Code section 602 based on a criminal offense committed when the child was under 14, the court must find by clear and convincing evidence, the child knew the wrongfulness of his or her act. (*In re Manuel L., supra,* 7 Cal.4th at p. 232.)

Knowledge of wrongfulness may not be inferred from the offense itself, but the court may consider the circumstances of the crime, including preparation, commission, and concealment. (*In re Tony C.* (1978) 21 Cal.3d 888, 900, superseded by statute on another issue.) The child's age and experiences are also significant factors in assessing his or her knowledge of wrongfulness: The closer a child is to the age of 14, the more likely it is he or she appreciates the wrongfulness of the acts. (*People v. Lewis* (2001) 26 Cal.4th 334, 378.)

The standard of review is substantial evidence. (See, e.g., *In re Cheri T.* (1999) 70 Cal.App.4th 1400, 1404.) We review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—to support the conclusions of the trier of fact. (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 820, superseded by statute on another issue.) "This standard of review applies with equal force to claims that the evidence does not support the determination that a juvenile understood the wrongfulness of his conduct." (*In re Jerry M., supra,* 59 Cal.App.4th at p. 298.)

Applying the substantial evidence rule, we conclude that the record as a whole—including rational inferences drawn from the evidence in the probation report—supports

the juvenile court's finding that defendant appreciated the wrongfulness of his conduct at the time of its commission. Defendant was 12 years old at the time of the incident under the bushes. "Generally, the older a child gets and the closer he approaches the age of 14, the more likely it is that he appreciates the wrongfulness of his acts." (*In re James B.* (2003) 109 Cal.App.4th 862, 872-873.) At the hearing on May 5, 2009, the juvenile court asked defendant if he knew the difference between right and wrong and if he understood that there would be consequences if he did something wrong. Defendant replied that he understood that. Defendant also stated that he understood that the act he committed related to the charge against him was wrong.

Additionally, the circumstances surrounding the incident supported a finding that defendant appreciated the wrongfulness of his conduct at the time. Defendant committed the act under the bushes, a place where he believed no one would see him. (See *In re Tony C., supra,* 21 Cal.3d at p. 901 [committing acts in private shows awareness of wrongdoing].) When confronted by Reyes and another neighbor, defendant pulled up his pants and walked away. Defendant's statements also showed that he appreciated the wrongfulness of his actions. When the officer responding to Reyes's call found defendant on the other side of the apartment complex, he began to yell, "I didn't do anything," and told the officers that he and the victim were inside some bushes throwing rocks. Subsequently, defendant further attempted to deflect blame from himself and claimed that the victim asked him to "hump" him. Defendant told the probation officer that he hated the victim and was upset that he got caught. The entire tenor of defendant's statements, where he initially denied doing anything wrong and then attempted to blame the victim (see *James B., supra,* 109 Cal.App.4th at p. 873), strongly supported the trial court's finding that the People had met their burden under section 26.

Defendant criticizes the limited questioning by the juvenile court and claims that the court did not determine whether he appreciated the wrongfulness of his sexual act; he asserts that his admission was insufficient to rebut the presumption under section 26. (See *In re Michael B.* (1975) 44 Cal.App.3d 443, 445-446.) This argument might have some force if the circumstances surrounding the incident did not support a finding that

defendant appreciated the wrongfulness of his actions. In *In re Michael B.*, the case cited by defendant, the "only evidence on [the issue of the minor's knowledge of the wrongfulness of his actions] was the brief statement of the police officer that [the minor] said yes when asked if he knew the difference between right and wrong. Penal Code section 26 requires more substantial evidence than that to clearly prove that a nine-year-old boy, no more than a third-grade pupil, harbored the necessary capacity to commit a serious criminal offense." (*Id.* at p. 446.)

Here, in contrast to the situation in *In re Michael B.*, defendant was 12 years old at the time of the incident. Defendant acknowledged in court that he knew the act was wrong and the court had the opportunity to observe his demeanor and assess his credibility. Furthermore, as already stressed, the clandestine nature of the bushes, defendant's leaving the scene as soon as the neighbors confronted him, and defendant's comments declaring his innocence and blaming the victim supported the trial court's finding that he knew his act was wrong.

III. *No Advisement Regarding the Registration Requirement*

Defendant contends that the juvenile court erred when it failed to advise him about the lifelong sex offender registration requirement associated with violating section 288. He maintains that his plea was therefore not knowing and voluntary. (See *Boykin v. Alabama* (1969) 395 U.S. 238, *In re Tahl* (1969) 1 Cal.3d 122.) The People argue that under *In re C.H., supra,* 53 Cal.4th 94, this issue is moot.

The Supreme Court in *In re C.H., supra,* 53 Cal.4th 94, held that a juvenile court may not commit a minor to DJF if the minor has never been adjudged to have committed an offense listed in subdivision (b) of Welfare and Institutions Code section 707.[7] Subdivision (a) of section 288 is not listed. Similar to the minor in *In re C.H.*, here, defendant was declared a ward of the court as a result of admitting a violation of subdivision (a) of section 288. Since defendant is ineligible for a DJF commitment under

[7] Violating subdivision (b) of section 288 is included in the offenses listed in Welfare and Institutions Code section 707, subdivision (b). However, the list does not include a violation of subdivision (a) of section 288.

the holding of *In re C.H.*, defendant does not have to register pursuant to section 290.008.[8]

Defendant responds that his argument is not moot because he *could* be required to register under section 290.008 if he is later committed to DJF for another offense and the juvenile court decides to aggregate the earlier sex offense with the subsequent committing offense. (See *In re G.C.* (2007) 157 Cal.App.4th 405, 409-410; *In re Alex N.* (2005) 132 Cal.App.4th 18, 21-25.) The People respond that the section 290.008 registration requirement is collateral as it would only occur *if* defendant committed another act, resulting in his being committed to DJF, *and* the court's deciding to aggregate the committing offense with his section 288, subdivision (a) offense.

We need not consider whether defendant's argument that relies on two contingencies occurring in the future has any merit, because we agree with the People's additional argument that defendant cannot establish prejudice. The failure to advise regarding the direct consequences of a guilty plea is reversible error only if "the defendant establishes that he or she was prejudiced . . . , i.e., that the defendant would not have entered the plea of guilty had the trial court given a proper advisement." (*In re Moser* (1993) 6 Cal.4th 342, 352.) In order to establish prejudice, the defendant must demonstrate affirmatively that it is "reasonably probable that such admonishment would have persuaded [the defendant] to deny the truth of the allegations." (*In re Ronald E.*

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[8] Section 290.008 reads: "(a) Any person who, on or after January 1, 1986, is discharged or paroled from the Department of Corrections and Rehabilitation to the custody of which he or she was committed after having been adjudicated a ward of the juvenile court pursuant to Section 602 of the Welfare and Institutions Code because of the commission or attempted commission of any offense described in subdivision (c) shall register in accordance with the Act. [¶] (b) Any person who is discharged or paroled from a facility in another state that is equivalent to the Division of Juvenile Justice, to the custody of which he or she was committed because of an offense which, if committed or attempted in this state, would have been punishable as one or more of the offenses described in subdivision (c) shall register in accordance with the Act. [¶] (c) Any person described in this section who committed an offense in violation of any of the following provisions shall be required to register pursuant to the Act: [¶] . . . (1) any violation of . . . [section] 288 . . . ."

(1977) 19 Cal.3d 315, 325-326, overruled on another issue in *People v. Howard* (1992) 1 Cal.4th 1132, 1175-1178.)

Defendant's sole argument regarding prejudice is his assertion that he would not have admitted the charge as he had strong defenses to the charges pursuant to section 288, subdivision (a). His "strong" defenses, according to defendant, were his age and the "weak" evidence of his willfulness. He further asserts that even if the court had sustained both counts under section 288, subdivision (a), he would not have faced an adult determinate sentence. He claims that "[u]nder these circumstances, it is safe to assume that [defendant] would not have admitted the section 288 allegation had he been properly informed of its consequences."

We disagree that the evidence against defendant was weak and defendant has submitted no evidence that registration was even a factor that was important to him. Defendant never challenged his plea or sought to withdraw it at any stage of the proceedings before the juvenile court. Defendant's bare assertion, without any support from the record that he would not have admitted one count in return for having the second count dismissed had he been advised about a possible registration requirement, does not show prejudice. Moreover, defendant was represented by counsel and we presume his counsel advised him about the possible consequences of his admission. (See *Strickland v. Washington* (1984) 466 U.S. 668, 689.)

Defendant has failed to demonstrate that an advisement about the registration requirement at the time of his plea would have caused him to reject the negotiated agreement and to have instead insisted on proceeding to a jurisdiction hearing on two counts of violating section 288, subdivision (a). Accordingly, any alleged error was harmless.

IV. *Advisement of a Right to Jury Trial*

Defendant contends that the lower court erred by failing to advise him of his right to a jury trial before accepting his admission to section 288, subdivision (a). He argues that the lifetime residency restriction imposed on registered sex offenders that was a possible result of his admission to violating section 288, subdivision (a), is a punishment.

The People argue that this issue is moot because the court erred in sending him to DJF and therefore the registration requirement has not been triggered. Defendant repeats his contention that the issue is not moot because he could still be subjected to offender registration in the future.

Defendant acknowledges that defendants in juvenile delinquency proceedings generally do not enjoy a right to a jury trial, because delinquency proceedings are deemed to be civil and rehabilitative in nature. (*McKeiver v. Pennsylvania* (1971) 403 U.S. 528, 545 [held Constitution does not require jury trial in juvenile delinquency cases]; see also *People v. Nguyen* (2009) 46 Cal.4th 1007, 1019.) Defendant notes, however, that the Supreme Court has granted review to decide whether lifetime residency restrictions imposed on juveniles convicted of sex offenses are punitive in nature and therefore trigger the right to trial by jury. (*People v. Mosley* (2010) 188 Cal.App.4th 1090, rev. granted Jan. 26, 2011, S187965; *In re J.L.* (2010) 190 Cal.App.4th 1394, rev. granted March 2, 2011, S189721.) Defendant insists that the rule that juvenile courts need not provide jury trials does not apply when the adjudication may result in lifelong sex offender registration.

Defendant also recognizes that registration is not a punishment as applied to adult offenders, but claims it is a punishment as applied to juvenile offenders. Defendant cites *Smith v. Doe* (2003) 538 U.S. 84, where the United States Supreme Court held that an Alaska sex offender registration statute, which was similar to California's residency restrictions, did not constitute punishment as applied to adult offenders. (*Smith*, at p. 102.) Defendant argues that the court focused on the fact that the records are public when it explained: "Although the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record." (*Id.* at p. 101.) Defendant concludes that registration requires publication of otherwise confidential juvenile court records and therefore, for juveniles, constitutes punishment.

At this point in time, the law is that juveniles are not entitled to a trial by jury and there is no citable authority supporting defendant's position that the lifetime residency restriction constitutes punishment. Our Supreme Court has plainly stated that neither the federal nor state charter affords the right to a jury trial to juveniles. (*People v. Nguyen, supra,* 46 Cal.4th at p. 1019.) Thus, at this point, the law is that defendant was not entitled to a jury trial and therefore the juvenile court's advisements did not constitute error.

V. *The Probation Violation and Due Process*

A. *Notice of the Probation Violation*

Defendant contends that he received inadequate notice of his probation violation and therefore he was denied due process. The People respond that defendant has forfeited any objection to inadequate notice because he did not object at the probation hearing. Furthermore, the People assert that this argument is without merit.

The notice of probation filed on November 5, 2010, stated that on July 24, 2010, defendant was terminated from Martin's Place "for engaging in assaultive behaviors, thereby violating the rules of the program. On July 24, 2010, the minor admitted to Citrus Heights Police that he 'humped the victim on her butt with his erect penis.' "

Defendant argues that this notice was deficient because it failed to inform him of the evidence against him. The notice did not provide the name of the police officer reporting that he had confessed to the violation. The notice also did not identify Ortega, the staff person at Martin's Place, who was a witness. Defendant claims that the lack of this information prevented him from conducting an investigation for his defense.

Defendant argues that he did not forfeit a due process argument as he objected to Ortega's testimony at the probation revocation hearing. Defendant ignores, however, that he never objected to the officer's testimony and he never made any objection based on a lack of notice. Defendant objected to Ortega's testimony on hearsay grounds. Defendant did not raise a due process objection in the trial court, and may not raise it for the first time on appeal. (See *In re Brian K.* (2002) 103 Cal.App.4th 39, 42.)

Furthermore, defendant cannot prevail on the merits. Due process requires that a defendant receive written notice of the alleged probation violation, disclosure of the evidence against him or her, and an opportunity to respond to the charges. (*Black v. Romano* (1985) 471 U.S. 606, 612.) "[T]he essence of due process is actual notice and a 'meaningful opportunity' to be heard." (*In re Brian K, supra,* 103 Cal.App.4th at p. 42.) Here, defendant received notice that he was in violation of probation because he sexually assaulted a staff member at Martin's Place on July 24, 2010, and that the evidence against him included a confession to an officer. The written notice adequately advised defendant that it was his sexual assault of a staff member at Martin's Place that was being alleged as the basis for the violation. The notice did not have to name the officer or specify all possible witnesses.

B. ***The Juvenile Court's Findings of a Probation Violation***

Defendant asserts that the trial court failed to make adequate written findings of a probation violation. He claims that the deficient written findings violated his due process rights.

Courts have consistently held that due process does not require a written statement of decision when there is an official reporter's transcript of the oral proceedings and this transcript provides the court's reasons for finding a probation violation. (*People v. Scott* (1973) 34 Cal.App.3d 702, 708; *People v. Moss* (1989) 213 Cal.App.3d 532, 534.) Here, the transcript establishes that the court found by a preponderance of the evidence that defendant "engaged in assaultive behaviors thereby violating the rules of the program of Martin's Achievement Place; and second, that he admitted to Citrus Heights police that he humped the victim on her butt with his erect penis." Thus, the transcript includes a clear statement by the court of its reasons for concluding that defendant violated his probation.

Defendant maintains that the court in *People v. Bonnetta* (2009) 46 Cal.4th 143 indicated that a transcript of the court's oral statement is an inadequate substitute for a written statement of decision. *Bonnetta,* however, does not benefit defendant. The statute construed in *Bonnetta*, section 1385, subdivision (a), explicitly required that the

reasons for the court's order " 'be set forth in an order entered upon the minutes.' " (*Bonnetta,* at pp. 145-146 & fn. 1.) The reasoning and holding in *Bonnetta* do not apply to the present case because there is no express requirement of a written statement of reasons. Accordingly, we conclude that any alleged deficiency in the court's written findings of a probation violation did not violate defendant's due process rights.

VI. *Commitment to the DJF*

Defendant contends that the juvenile court abused its discretion in committing him to the DJF. In his supplemental brief and reply brief, he asserts that the commitment was error and cites *In re C.H., supra,* 53 Cal.4th 94.[9] As already discussed, the Supreme Court in *In re C.H.*, held that a juvenile court may not commit a minor to DJF if the minor has never been adjudged to have committed an offense listed in subdivision (b) of Welfare and Institutions Code section 707. Subdivision (a) of section 288 is not listed.

The People agree that the court did not have the authority to commit defendant to DJF. Accordingly, we reverse that portion of the disposition order that commits defendant to DJF.

VII. *Cruel and Unusual Punishment*

Defendant claims that a lifetime sexual offender registration requirement constitutes cruel and unusual punishment under the state and federal Constitutions (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17) and violates substantive due process. The People assert that this issue is moot because defendant cannot be sent to DJF for an offense not listed in Welfare and Institutions Code section 707, subdivision (b). Defendant again argues that this issue is not moot because he could still be forced to register as a sex offender if he were subsequently committed to DJF because he committed another offense and the juvenile court decided to aggregate the earlier sex offense with the subsequent committing offense.

Defendant does not currently face a registration requirement and we need not consider whether a possible future requirement is constitutional. There is no evidence

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[9] *In re C.H.* was decided after defendant filed his opening brief in this court.

that the residency restrictions will ever be applied to him. Analysis of a cruel and unusual punishment claim requires "an examination of 'the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society.' " (*People v. Dillon* (1983) 34 Cal.3d 441, 479, superseded by statute on another issue.) "In conducting this inquiry, however, the courts are to consider not only the offense in the abstract—i.e., as defined by the Legislature—but also 'the facts of the crime in question' [citation]—i.e., the totality of the circumstances surrounding the commission of the offense in the case at bar, including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts. [¶] Secondly, it is obvious that the courts must also view 'the nature of the offender' in the concrete rather than the abstract: although the Legislature can define the offense in general terms, each offender is necessarily an individual. . . . This branch of the inquiry therefore focuses on the particular person before the court, and asks whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (*Ibid.*) Thus, even if we presume that registration is punishment, which is contrary to the holding of our Supreme Court in *In re Alva* (2004) 33 Cal.4th 254, we cannot determine whether such a requirement is disproportionate or offensive in the abstract and without knowing what new offense defendant committed that resulted in his being sent to DJF.

For similar reasons, we decline to consider defendant's substantive due process claim.[10] Our Supreme Court in *In re E.J.* (2010) 47 Cal.4th 1258 considered a unified habeas corpus petition regarding the residency restriction for four registered sex offender parolees. When addressing their argument that the residency requirement violated their rights to substantive due process and other rights, the court explained that evidentiary hearings would have to be conducted to establish the relevant facts necessary to decide

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[10] The court in *People v. Jeha* (2010) 187 Cal.App.4th 1063, held that "defendants who have been convicted of crimes have greatly attenuated privacy rights" and statutes requiring an adult to register as a sex offender do not violate the offender's right to substantive due process because registration is reasonably related to a proper legislative goal. (*Id.* at p. 1080.)

each claim. (*Id.* at p. 1281.) Here, no hearings can be conducted because it is unclear that defendant will ever have to register and, since we cannot assess facts not yet before us, defendant's substantive due process challenge is premature.

VIII. *Maximum Period of Confinement*

Defendant argues in his opening brief that the juvenile court did not exercise its discretion under Welfare and Institutions Code section 731, subdivision (c) when it stated that it was committing defendant to the DJF for a period not to exceed eight years. As defendant acknowledges in his reply brief, we need not address this issue because the juvenile court erred when it committed defendant to DJF.

DISPOSITION

The juvenile court's disposition order committing defendant to DJF is reversed. In all other respects the orders of the juvenile court are affirmed. The case is remanded to the juvenile court for further proceedings in accordance with *In re C.H., supra,* 53 Cal.4th 94, regarding defendant's placement.

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Lambden, J.

We concur:

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Haerle, Acting P.J.

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Richman, J.